

FEDERAL ELECTION COMMISSION

PROBABLE CAUSE ORAL HEARING

MUR 5818

Tuesday, July 14, 2009

**999 E Street, N.W.
9th Floor Meeting Room**

**JARDIM REPORTING ASSOCIATES
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29044253317

Washington, D.C.

COMMISSION MEMBERS:

STEVEN T. WALTHER, Chairman

MATTHEW S. PETERSEN, Vice Chairman

CYNTHIA L. BAUERLY, Commissioner

CAROLINE C. HUNTER, Commissioner

ELLEN L. WEINTRAUB, Commissioner

DONALD F. McGAHN II, Commissioner

ALSO PRESENT:

THOMASENIA P. DUNCAN, General Counsel

ROBERT A. HICKEY, Staff Director

ANN MARIE TERZAKEN, Associate General Counsel

For Enforcement

MARK D. SHONKWILER, Assistant General Counsel

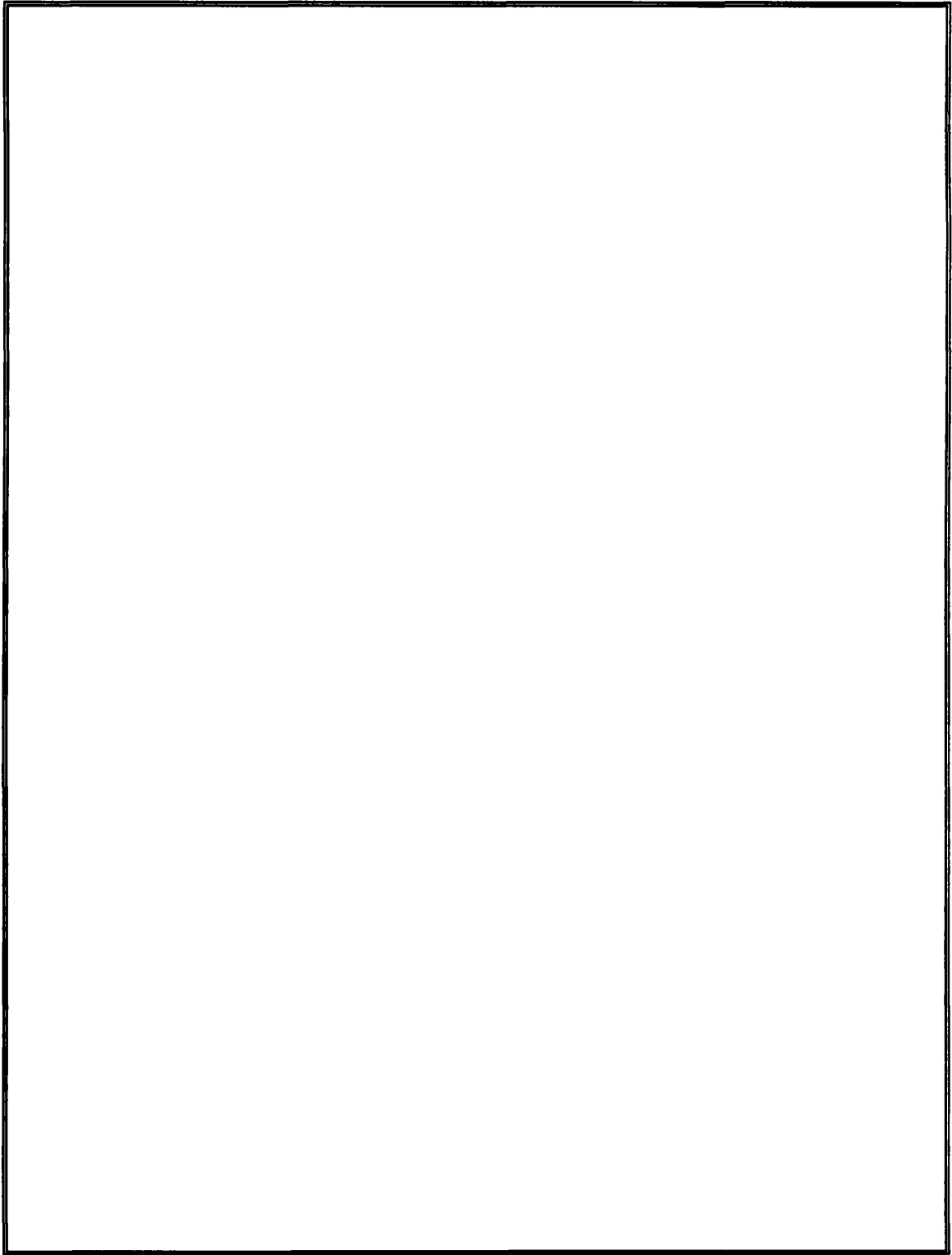
PHILLIP A. OLAYA, Staff Attorney

WITNESSES:

MICHAEL R. DEZSI, ESQ., Fieger Fieger Kenney Johnson &
Giroux, P.C.

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P R O C E E D I N G S

(3:06 p.m.)

CHAIRMAN WALTHER: Good afternoon, everyone.

We'll reconvene this special executive session in order to conduct a hearing on probable cause. This is part of a procedure that we've adopted to give the opportunity to Respondent to provide us with oral argument on the issues respecting probable cause determinations on behalf of the Commission.

This is -- I'm told that only one person will talk on behalf of the respondents, Mr. Michael Dezsi, if I have your name spelled correct -- pronounced correctly?

MR. DEZSI: That's correct, yes.

CHAIRMAN WALTHER: Welcome to the Commission. It's nice to have you here.

MR. DEZSI: Thank you. Welcome. Thank you.

CHAIRMAN WALTHER: We will proceed under the rules that you've seen and mentioned. We'll ask you, to the extent you wish, to give an opening statement of 10 to 15 or 20 minutes, however you see fit. We'll then take questions from the commissioners. I've gone back and forth as to

1 whether we call on the individual commissioners. Last time
2 it was kind of an open, informal way to approach it. Maybe
3 we'll go -- let's just figure we'll go ahead and you can
4 take questions from commissioners at random and then offer
5 you some time at the end, five minutes or so, to wrap it up.
6 We'll do one hour, no more.

7 MR. DEZSI: Sure. Thank you.

8 CHAIRMAN WALTHER: So please proceed and it's nice
9 to have you here.

10 MR. DEZSI: Thank you. Mr. Chairman and members
11 of the Commission, thank you for the time and the
12 opportunity to appear here today. If I could begin possibly
13 by just backing up and explaining to you how I come to you
14 today, and I don't mean by way of flight or airline, but
15 rather how this case proceeded here and what brings me to
16 sit at this table.

17 My clients have been, I guess, entangled with this
18 issue for several years now and this goes back to 2005, and
19 it actually began with the Michigan attorney general
20 conducting an investigation which basically fizzled out in
21 the very early stages and that involved some state campaign

1 finance issues.

2 However, that didn't progress very far. However,
3 as that investigation was concluded, or concluding, I should
4 say, federal agents then intervened with search warrants and
5 they obtained all of the materials and documents that the
6 state attorney general had already obtained in his
7 investigation.

8 So what we found was that we began already with
9 the state attorney general and we had an investigation that
10 did not progress, as I said, into anything productive and
11 that was dropped almost immediately, however, not before
12 federal agents had come in with their own search warrants
13 and subpoenas to obtain all of the documents that were
14 obtained by the state attorney general.

15 That brings us up into November of 2005, at which
16 time my client's law firm, the Fieger Law Firm, was
17 subjected to a search warrant raid, as well as all of the
18 homes of the employees, their family members. We're talking
19 about somewhere in the environment of 75 to 100 federal
20 agents who descended in the evening hours onto the homes of
21 all of the employees, the law firm, again for the purposes

1 of executing search warrants.

2 And at that time, I believe federal agents had --
3 they had taken, I want to say, 65,000 or 80,000 pages of
4 documents. So that's November of 2005, after which we moved
5 into a grand jury investigation that lasted almost 18 months
6 and was followed by indictments that were issued in August
7 of 2007.

8 The indictments, as I'm sure you're aware, allege
9 campaign finance violations based most specifically on 441f
10 and 441b. That case proceeded to trial and I was counsel of
11 record in that case. However, Mr. Gerry Spence from Wyoming
12 was lead trial counsel. I did work on that case, so I am
13 familiar with all of the -- of all of the inner workings,
14 all of the pleadings, everything that was filed, obtained.
15 Everything that was viewed in that case, I am familiar with
16 those documents.

17 That case proceeded to trial in April of 2008 and
18 that lasted almost six weeks, after which a jury unanimously
19 acquitted my clients across the board of all charges. In
20 the wake of the acquittal, most of the jurors, some of the
21 jurors, expressed outrage and disbelief at the government's

1 case and they had basically said, we were waiting for
2 something. We were waiting to see something other than what
3 the government presented to us in this trial.

4 Of course, as you know, the acquittal -- that the
5 acquittal was entered in June of 2008. And that now brings
6 us here. I don't profess to understand the position of the
7 commissioners or how difficult your job must be. I read a
8 lot about your cases and the issues that are proceeding
9 before the Commission. I understand that they're all --
10 they're usually hotly contested and there's always different
11 issues, constitutional issues and whatnot.

12 However, in this case, I believe that the
13 Commission's job may be made a little simpler by the fact
14 that this case has already been done. This case has already
15 been tried by the Justice Department without success and
16 perhaps if the Commission wonders well, what happened in
17 that case, and I'm sure you have the trial transcripts, as
18 those are all available, but I can tell you what happened,
19 anecdotally of course, but I can tell you what happened in
20 that case.

21 The prosecution started with a theory of the case

1 that just simply didn't work and they had started with this
2 theory that 441f prohibits reimbursement. Now it is my
3 client's steadfast belief as a matter of First Amendment and
4 Constitutional law, it is their steadfast belief that 441f
5 does not criminalize or prohibit reimbursements. When I
6 began meandering the law of this subject years ago, and I've
7 been working on this for years, since this has -- from the
8 inception until now I have been working on this and I have
9 found only one case which is very recent. I shouldn't say I
10 found it, because I never had it before. But recently a
11 federal court in the case of Pierce O'Donnell directly
12 addressed the statute which is -- which brings me directly
13 to this table, which is 441f and whether 441f criminalizes
14 or prohibits reimbursement.

15 Just to put this into context, Mr. Pierce
16 O'Donnell was indicted about two weeks after Mr. Fieger's
17 across-the-board acquittal and I have to tell you, I was a
18 little surprised that the Justice Department brought
19 essentially the same case against Mr. O'Donnell within weeks
20 of the Fieger acquittal.

21 But nevertheless, Mr. O'Donnell's case was

1 essentially the same. It was employees who made
2 contributions voluntarily to John Edwards and were later
3 allegedly reimbursed by Mr. O'Donnell and the government's
4 case again was a 441f reimbursement "conduit case."

5 Well, I believe -- perhaps I'm patting myself on
6 the back, but I believe Mr. O'Donnell's lawyers pulled all
7 of our pleadings and motions from the Fieger case and they
8 had made essentially the same arguments. And I have read
9 all of their motions that were filed in the Pierce O'Donnell
10 criminal case. The federal judge presiding over that case
11 agreed with Mr. O'Donnell and with my clients and squarely
12 held that 441f does not reach or prohibit reimbursement.

13 Now I'd like to talk about that because I believe
14 that really is the cornerstone of this case. When I began
15 working on this and I looked at this statute and I opened
16 the book and I read this as no contribution in the name of
17 another person, it seemed simple enough to me at the time I
18 cannot go down to the corner party store and get money
19 orders and I cannot then send them to a federal candidate in
20 the names of each of your commissioners and you're sitting
21 at home and you have no idea that Michael Dezsai is in

1 Detroit sending a money order and signing with a cover
2 letter, you know, good luck, President Obama, here's \$2,000,
3 and signing it in your name and the names of one of the
4 commissioners.

5 That is what that statute on its face says and
6 means to me. After extensive research and extensive
7 litigation on this, which culminated in Mr. O'Donnell's
8 case, I believe that that is the correct reading and it's
9 the only reading of this statute.

10 Now in Mr. O'Donnell's case, the prosecution said
11 well, we have these FEC regulations -- and I'm referring to
12 11 C.F.R. 110.4 -- and the judge in Mr. O'Donnell's case
13 said, actually no, I'm going to look at this and I'm going
14 to say it either does or it doesn't, and in this case, it
15 doesn't. And the prosecution said well, but we have this
16 FEC regulation. This 11 C.F.R.

17 And the judge says no, actually I don't have to
18 follow that and he cites Chevron and Chevron is the seminal
19 United States Supreme Court decision which says an agency
20 can promulgate regulations only to the extent that are
21 consistent with the statute. So in this case, the FEC's

1 regulations, the judge declined and refused to follow them
2 because he found that they were inconsistent with the
3 statute.

4 And as the judge had pointed out in that O'Donnell
5 opinion, if Congress wanted to prohibit reimbursement, if
6 they had wanted to criminalize it, they could have done so.
7 Now I can tell you because I have personally performed this
8 search. If you run the word "reimbursement" through the
9 United States Code, you'll find that it appears in the
10 United States Code more than 3,000 times. It does not
11 appear in 441f, or 441b for that matter.

12 So in the O'Donnell case, the judge had simply
13 looked at the face of the statute and he said no, this
14 doesn't reach reimbursements. Reimbursements are not
15 prohibited.

16 Now as I have represented to this Commission, and
17 I am willing to stand by my representation, that is the only
18 -- the only singular, only written opinion that you will
19 find that squarely addresses whether 441f prohibits and/or
20 criminalizes reimbursement under 441f. I am aware of the
21 cases that have been cited by the government, both -- I am

1 referring to the Justice Department at least in those
2 criminal cases, and perhaps they have been cited by the
3 General Counsel of this Commission as standing for the
4 proposition that reimbursement is prohibited.

5 Respectfully, none of those cases directly dealt
6 with the issue of whether 441f prohibits reimbursement.
7 Those cases were perhaps 441f cases, but the issues in those
8 cases that were being litigated were tangential to the issue
9 of whether 441f prohibits squarely reimbursement.
10 The opinion in O'Donnell is the only one that I am aware of
11 and I have searched long and hard. It is the only opinion
12 out there that you will find.

13 So where does this bring us? I told you earlier
14 that I was going to explain what happened to the Justice
15 Department's case, at least in Mr. Fieger's criminal case.
16 They started by not having any solid ground on which to
17 stand. That's how they started the case. Now Mr.
18 O'Donnell's case has also ended in a dismissal and I
19 understand that the Justice Department may or may not be
20 appealing that and I also understand that the General
21 Counsel has informed me by letter that it believes that that

1 opinion is a misunderstanding of the law.

2 I don't believe so and I believe that I would
3 leave it to each of -- each of you commissioners to look at
4 the statute for yourself and to look at the cases that are
5 cited and you can come to that conclusion yourself. I think
6 it's -- those cases speak for themselves in the fact that
7 the O'Donnell case is the only one that addresses it.

8 Now I want to talk about why this is important in
9 how the First Amendment comes into play into this -- in this
10 context. Let's just pretend for a moment that reimbursement
11 is prohibited. Let's just pretend. Let's follow that for a
12 second. Under what circumstances? By agreement? By
13 advance agreement? By reimbursement 30 days after, 60 days
14 after, a year after?

15 What if I meet one of you commissioners on the
16 street and you tell me you made a contribution and I say,
17 you know, that's really swell, and I've got money burning a
18 hole in my pocket? I really don't, but if I had the money
19 burning a hole in my pocket and I said, you know, I just
20 want to give you the money because I think it's such a great
21 thing that you did this, for instance, under what

1 circumstances would a scheme of reimbursement be prohibited?

2 The statute doesn't define that. It defines no
3 outer limits on how or under what circumstances these
4 reimbursements could be made illegal and if we're going to
5 infringe on somebody's First Amendment rights, we all know
6 that it needs to be by narrowly constructed laws. So it
7 would be for Congress to redraw that law and to indicate the
8 circumstances under which it would apply or how
9 reimbursement would be made prohibited by the act.

10 Let's take that a step further. For instance,
11 what about a non-working spouse? What if you work, your
12 spouse doesn't. Your spouse makes a contribution. Is that
13 a reimbursement? Well, it is if we're going to say any form
14 of reimbursement is a crime.

15 Then now you have made a criminal out of your
16 spouse, and those were the same sorts of allegations that
17 came up in the Fieger case, in the O'Donnell case. What
18 about your adult children? If you have adult children in
19 college and they rely on you for all of their expenses and
20 you pay their bills -- and I'm sure you're really happy
21 about doing that.

1 CHAIRMAN WALTHER: Now you're hitting home.

2 MR. DEZSI: Well I'm not personally, but perhaps -
3 - I don't have children asking me and I don't have any
4 children old enough to make contributions. But let's say
5 your children made the contributions and they were in
6 college and they came home and told you and you said, you
7 know, that's really great, and I know you don't have a lot
8 of money, I'm going to give you the money. It can't
9 possibly be the law, if reimbursement is a crime, then that
10 now you have just made a criminal out of your child for
11 something that is completely innocuous.

12 My point is not to stretch the imagination. My
13 point is to say, if we're going to make these things a
14 crime, Congress needs to tell us how, under what parameters
15 and under what circumstances these things will be
16 prohibited. We know that Congress can pass laws that
17 infringe on the First Amendment if there's a -- if there's a
18 substantial -- a compelling interest and if it's done by
19 narrowly -- a narrowly constructed law. Okay, that's just
20 basic First Amendment, sort of one-on-one kind of stuff.

21 Well this is core First Amendment and I know that

1 all of you know this because you're in this position and I'm
2 sure you hear all of the arguments about election laws and
3 whether they violate First Amendment, whether they're a
4 restriction on the First Amendment.

5 Well I'm not saying there shouldn't be any laws on
6 contributions. I'm not saying that. What I'm saying is, if
7 you have an instance where you're going to infringe, then
8 you have to do it by narrowly constructed law and in this
9 case, we don't have one that makes these particular
10 instances --

11 CHAIRMAN WALTHER: Counsel, you've got four
12 minutes left.

13 MR. DEZSI: Thank you.

14 CHAIRMAN WALTHER: And then you'll be at a 20
15 minute mark.

16 MR. DEZSI: Sure. We have nothing that makes the
17 particular instance of reimbursement a crime. So if we
18 return to where we started from, the government's case --
19 and I mentioned to you earlier I don't profess to think your
20 job is easy. However, and this is -- in this instance, I
21 think it can be made easier by the fact that this case has

1 already been done.

2 We -- my clients have already endured a criminal
3 trial, an indictment, and they were acquitted of all of the
4 charges. I'm not certain how this case will proceed and end
5 in any other result given that this case has already been
6 tried in court and that a jury found my clients not guilty
7 of all of the charges.

8 Also, I'd like to point out, there are only three
9 cases that I know of -- three cases on 441f. Another trial
10 was Franklin Haney, a Tennessee real estate broker, and
11 Franklin Haney was also indicted by the Justice Department
12 on a 441f theory. A jury acquitted Mr. Haney in like less
13 than two hours, or somewhere in that environment.

14 So I know of three cases I can give you directly
15 where a 441f case has not made it out of the gate -- well,
16 they've made it out of the gate, but they didn't make it to
17 the end -- Mr. Fieger's won; Mr. Pierce O'Donnell's case,
18 which was dismissed entirely on motions; and Mr. Haney's
19 case, three major losses by the Justice Department in cases
20 of 441f.

21 Now had the sequence of these acts -- of these

1 actions been reversed, perhaps we would be having a very
2 different conversation.

3 CHAIRMAN WALTHER: Do you want to reserve any time
4 for follow-up because you're now -- you have three minutes
5 left. You will have had 20 -- you're 20 minutes in.

6 MR. DEZSI: Actually, I'll just -- I'll just
7 reserve a couple -- my last minutes for follow-up.

8 CHAIRMAN WALTHER: Thank you. I'd like to just
9 start out by asking you one question. Do you distinguish
10 the case of the Federal Election Commission v. Williams,
11 that particular case? That case is a non-published case, as
12 is this one, in the same district as O'Donnell.

13 MR. DEZSI: As is this one. I'm sure --

14 CHAIRMAN WALTHER: The one you're referring to?

15 MR. DEZSI: The O'Donnell?

16 CHAIRMAN WALTHER: Right, as I understand, they're
17 both published and they're both in the same district, but in
18 that particular case, the Court said, it appears clear to
19 the Court the Defense contact is either advancing or
20 reimbursing \$1,000 to the 22 individuals, violates the
21 prohibition of making contributions, including loans,

1 advances or gifts for the purpose of influencing an election
2 in another person's name. This constitutes a violation of 2
3 U.S.C. Section 441f, and it continues on.

4 MR. DEZSI: I'm not familiar with the Williams
5 decision.

6 CHAIRMAN WALTHER: The other questions -- I have
7 some more, but Mr. McGahn.

8 COMMISSIONER MCGAHN: Thank you, Mr. Chairman.
9 Williams is an unpublished opinion. It was reversed on
10 other grounds at the 9th Circuit, and it seems to stand for
11 the proposition that F may be clear enough for criminal.
12 It's an unpublished opinion, so you really wouldn't have any
13 reason or ability to find it. But there is actually another
14 case floating out there, so it seems like you have two.

15 I think the chairman was just bringing it to your
16 attention. I don't know what the procedures are for such
17 late -- essentially late submitted authority, but I don't
18 think anyone's trying to play gotcha. I think it's just we
19 had this other opinion, which of course the FEC was a party
20 to, but you weren't, so there's no way you would know it.

21 I have a couple of questions. Some of your

1 argument reminds me of the line of cases out of the Supreme
2 Court that raised the potential for double jeopardy, even
3 though it's a civil proceeding and it comes really out of
4 the asset forfeiture line of cases and the nature of the
5 penalty and that kind of thing.

6 In your brief, you don't squarely raise double
7 jeopardy. You haven't used that term here, but you have
8 emphasized the fact that essentially the case is over, which
9 is a layman's word of saying double jeopardy. Are you
10 raising double jeopardy?

11 MR. DEZSI: We have not raised double jeopardy at
12 this point.

13 COMMISSIONER McGAHN: All right. You mentioned --
14 I also hear in argument that look, if Congress wanted to
15 make this illegal, they know how to do it. The Federal
16 Code, there's examples of language much more clear. Those
17 examples are legion. But you did say if the Congress wanted
18 to make this a crime, they could be more specific.

19 This is a civil agency. Could you maybe flesh
20 out, to the extent you have a position on the distinction
21 between the fact that there's a criminal, beyond a

1 reasonable doubt standard and there's what we do, which may
2 or may not include a knowing and willful violation which
3 gets you in the criminal zone, but what about the underlying
4 fact pattern even if your client didn't necessarily have a
5 knowing and willful state of mind?

6 MR. DEZSI: Well Commissioner, thank you. I would
7 point out that the Commission's Reason to Believe Letter
8 that was sent to my clients in September of 2006, it did not
9 allege non-knowing and willful violations. That is a new
10 allegation that was raised only recently by the General
11 Counsel in their letter dated to me; I think it was June 5.
12 So that particular -- the non-willful, non-knowing, non-
13 willful violations has not been raised heretofore until now
14 and it was never part of the Commission's reason to believe
15 findings.

16 And also on that same line, I'd like to point out
17 that the most recent letter by the General Counsel also
18 raises for the first time allegations of 441(a) violations,
19 again, never part of the Commission's reason to believe
20 findings in September of 2006.

21 I just wanted to clarify that. I know it's a

1 little bit further than your point.

2 COMMISSIONER McGAHN: No, because that was
3 actually my next question. I take your point on O'Donnell,
4 which talks about F But when you're reading what I call
5 part 2 of O'Donnell, when it gets into the kind of reporting
6 issue and whether it was a false report, that gets kind of
7 confusing, because the question I have is what about parts A
8 and B of 441, which is the excessive contribution and the
9 corporate contribution angle.

10 On the one hand, do you have to drive through F to
11 get to A and B in this case, or even with O'Donnell, even if
12 I take your argument on O'Donnell and agree, what about A
13 and B? I hear you making an argument that well, that wasn't
14 in the reason to believe finding, perhaps that ship has
15 sailed. If that's your argument, maybe you could state
16 that, but is there more to it than that?

17 MR. DEZSI: That is my argument, that those were
18 not included in the reason to believe finding. However, I
19 do believe you have to get through 441f. Now the O'Donnell
20 opinion goes on to discuss the false statements, I guess the
21 1001. Of course, that's part of the criminal penal code,

1 and as well as the 441b.

2 I believe the discussion on 441f is the most on
3 point and it's what you use in this instance to figure out
4 if you can even make it to the next step.

5 CHAIRMAN WALTHER: I don't see that. Okay, but we
6 do need to move it along for everybody.

7 COMMISSIONER McGAHN: In your brief on page two,
8 you state during the criminal proceedings, federal
9 prosecutors openly acknowledged that they did not have a
10 single case to support their self-serving reinterpretation
11 of the law. If I wanted to look for that open
12 acknowledgement, where would I find it? Was that an oral
13 argument or in a brief or something?

14 MR. DEZSI: It was in a brief. I cannot refer you
15 to -- it was in one of the motion -- the pre-trial motions
16 in limine. Now keep in mind that in Mr. Fieger's case, we
17 never squarely raised a motion to dismiss like Mr. O'Donnell
18 did. So if you're wondering well, why didn't you guys have
19 this same opinion, why didn't you get the O'Donnell opinion
20 in Fieger's case, we never filed a motion to dismiss and we
21 did that for our own reasons.

1 COMMISSIONER McGAHN: Defense counsel makes
2 decisions and defense lawyers do what they do because it
3 works.

4 MR. DEZSI: Right, and we didn't raise the motion,
5 as Mr. O'Donnell did. However, the argument was coming up
6 in some of the pre-trial motions in limine, and I would be
7 happy to supplement my submissions to the Commission and
8 pull the government's pleadings on that point and submit
9 that for your review.

10 Short of -- I think the way they said it was
11 something like maybe they said the defendants have no case
12 to disprove this or something like that. But they
13 acknowledge there was no case.

14 COMMISSIONER McGAHN: But they didn't cite this on
15 the reported Williams case either?

16 MR. DEZSI: No.

17 COMMISSIONER McGAHN: Okay. That's kind of where
18 I'm going.

19 MR. DEZSI: No, they, I believe, also relied on the
20 FEC reg, the 1996 advisory opinion. Not the reg. Excuse
21 me, they did not rely on 11 C.F.R. 110.4. They relied on

1 the advisory opinion 1996-33. I believe that's the one.
2 That's what they had relied on in Fieger's criminal case.

3 COMMISSIONER McGAHN: By criminal case, they
4 relied on an A0, an advisory opinion?

5 MR. DEZSI: Yes.

6 COMMISSIONER McGAHN: That's enough for criminal -
7 -

8 MR. DEZSI: No. Judge Borman, in Mr. Fieger's
9 criminal case, was not persuaded to use it, but for the same
10 reason, the judge in the O'Donnell case did not use it. But
11 Chevron is the answer to that question, as to -- even as to
12 11 C.F.R. 110.4. Chevron is the answer to that question and
13 I believe the judge was correct in citing it.

14 COMMISSIONER WALTHER: We need to move to other
15 commissioners who may have questions. Are there others?
16 Commissioner Weintraub.

17 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.
18 So just to be clear, you don't deny that your client
19 personally and through his law firm, P.C., reimbursed
20 contributions?

21 MR. DEZSI: Actually, Commissioner, thank you for

1 your question, but I'm unable to make any concession about
2 any of the factual concessions of that case. However, I can
3 point you to the transcripts from the trial.

4 COMMISSIONER WEINTRAUB: We got the transcripts.

5 MR. DEZSI: Okay, from the -- the trial
6 transcripts, and Mr. Fieger did testify during the criminal
7 case and he discusses at length those facts. However, only
8 because the regulations for these proceedings indicate that
9 any concession that I make can be used against the
10 respondents, I'm not able, respectfully, to make any
11 admissions or concessions on the record in response to that
12 question; I can only refer you to the trial transcripts.

13 COMMISSIONER WEINTRAUB: But if I have trial
14 transcripts in which your client under oath at a criminal
15 trial said, yes, we reimbursed, you're not going to deny
16 that?

17 MR. DEZSI: Certainly not. I wouldn't deny that
18 if that's what's in the transcript, certainly not.

19 CHAIRMAN WALTHER: Other questions? Commissioner
20 Weintraub, do you have other questions? Let me ask you this
21 -- go ahead.

1 COMMISSIONER WEINTRAUB: Just your basic claim is
2 that it's irrelevant whether he reimbursed or not?

3 MR. DEZSI: That's correct.

4 COMMISSIONER WEINTRAUB: And it's irrelevant
5 whether the -- if the Edwards Campaign filed reports
6 disclosing dozens of contributors who actually were just
7 funneling money from your client; that's also irrelevant?

8 MR. DEZSI: I don't know if I would necessarily
9 say it's irrelevant, but I believe we stop with the 441f
10 question and we don't even reach the next question.

11 COMMISSIONER WEINTRAUB: You do, but that doesn't
12 mean that I do.

13 MR. DEZSI: No, I understand, but I am just
14 explaining to you my client's position.

15 COMMISSIONER WEINTRAUB: Right, so -- okay.

16 CHAIRMAN WALTHER: Any questions? Mr. Vice
17 Chairman?

18 VICE CHAIRMAN PETERSEN: Thank you, Mr. Chairman.
19 I was going through the jury instructions that were handed
20 out in the criminal trial and one of the instructions,
21 instruction 19 says, the Court has ruled that sections 441b

1 and 441f prohibit reimbursement by an individual or a
2 corporation of federal campaign contributions.

3 Could you just walk me through what rulings the
4 Court made with respect to 441b and 441f?

5 MR. DEZSI: Sure, I certainly will. As I
6 indicated, the argument was coming up during pre-trial
7 motions, specifically motions in limine, as to what types of
8 arguments could be made. And the government, the
9 prosecution asked that the defense not be permitted to say
10 reimbursement was not a crime. Okay?

11 That's step one. During the opening argument,
12 Gerry Spence had made certain arguments that the judge felt
13 had violated his order. So immediately following the
14 opening arguments, the judge gave an instruction immediately
15 to the jury and said, I've already instructed you that
16 reimbursement is a crime under 441f. I'm paraphrasing, of
17 course. That's how that came to be, that what you just
18 indicated.

19 VICE CHAIRMAN PETERSEN: If I could just ask.

20 CHAIRMAN WALTHER: Go ahead.

21 VICE CHAIRMAN PETERSEN: A couple other just small

1 questions. I hear what you're saying about 441f and about
2 reimbursement and you draw out some hypotheticals regarding
3 children, spouses. And in those scenarios, we have a
4 voluntary contribution and then later someone else finding
5 out about it and providing a reimbursement.

6 Does the analysis change, from your opinion from
7 reading the O'Donnell case, if there was some sort of pre-
8 arrangement before the -- before the contribution is given
9 in that an individual approaches someone, says I've maxed
10 out? For example, if someone -- if I were to say, I've
11 maxed out what I can give to this candidate, but you can
12 give to that candidate, why don't you give from your
13 personal funds and then I'll reimburse you?

14 Is your opinion that under -- even under that
15 scenario that would still be considered a voluntary
16 contribution from the straw donor, for lack of a better
17 word, and not a contribution from the person who solicited
18 that contribution?

19 MR. DEZSI: Yes, my position would be unchanged as
20 to that scenario. However, I like to call that the
21 prosecution is slipping scenario. And what has happened, at

1 least in the other cases, the criminal cases, that the
2 Justice Department has sort of fallen into that as their
3 default position if they felt they couldn't get the whole
4 ball of wax on reimbursement is prohibited. They sort of
5 slipped out into well then, it's prohibited by advance
6 agreement. So they basically start to write terms into the
7 statute which you won't find.

8 So that would be -- my argument goes back to, as
9 Commissioner McGahn mentioned as the O'Donnell opinion, my
10 argument is the same as to that. It needs to be written
11 into the law. However, the Justice Department seems to use
12 that when they find that they're slipping on the first few.

13 VICE CHAIRMAN PETERSEN: The final question I have
14 is -- goes back to an issue that Commissioner McGahn brought
15 up regarding the third portion of the O'Donnell case about
16 false statements. My read of that seems to indicate that
17 they didn't dismiss that portion of the case because it
18 considered the reason why Mr. O'Donnell would have caused
19 the campaign to make a false statement, is because they
20 didn't report the true source of the contribution.

21 Under that analysis and under that logic it was

1 the individual who gave the money to the straw donor, again
2 to use that term. That was the true source of the money and
3 in essence that was the person who gave the contribution.
4 Is that how you read that portion of the O'Donnell case?

5 MR. DEZSI: You know, the portion of the O'Donnell
6 case that deals with the 1001 isn't entirely clear to me. I
7 haven't focused on it as much only because I was -- my
8 arguments were centered on 441f and 441b. Perhaps it can be
9 reconciled by the fact that the prosecution generally
10 charges in 18 U.S.C. Section 2, in conjunction with 1001,
11 which is aiding and abetting, causing another to do.

12 So perhaps that could be the way that the Court
13 reconciled how they get the 1001 statements, how the
14 government is able to keep those.

15 CHAIRMAN WALTHER: Commissioner Hunter.

16 COMMISSIONER HUNTER: Thank you, Mr. Chairman.
17 Had the Office of General Counsel or the FEC put in the RTB
18 finding that there was also a possibility of a non-knowing
19 and willful violation, do you think your clients would agree
20 that they may have violated that portion if it was non-
21 knowing and willful and non-willful?

1 MR. DEZSI: No, I don't. I don't believe so. My
2 clients steadfastly maintain that they did not violate any
3 of the provisions of the act and having undergone the trial
4 and having been acquitted, they continue to maintain that
5 they have not violated any provisions, either knowingly or
6 not knowingly.

7 CHAIRMAN WALTHER: Any further questions? I know
8 it almost goes without saying that let's get on with it
9 because you had said at the very beginning we are basically
10 precluded because of O'Donnell if we believe O'Donnell's
11 binding law on the Commission, even though it's an
12 unpublished opinion and even though there's a contradictory
13 unpublished opinion in the same federal district.

14 But assuming we decide O'Donnell precludes it for
15 some reason, why? It's a criminal case, different court,
16 different standard of proof. Ours does not have to be
17 beyond a reasonable doubt. Perhaps intent could or could
18 not be proven in our matter, so how is it different than the
19 same procedures of O.J. Simpson or other ones that you do
20 have where there's no building on the subsequent civil
21 judgment that's entered? Why are we precluded, assuming we

1 have a different standard of proof?

2 MR. DEZSI: Thank you, Mr. Chairman. I believe --
3 I believe that question could be answered simply because it
4 was a matter of statutory construction. If the O'Donnell
5 court said, you don't have -- you don't have something upon
6 which to stand, I don't think it matters. We don't even get
7 into the burdens of proof and whether it would be civil
8 versus criminal.

9 It's a matter of statutory construction which says
10 you don't -- you're not standing on firm ground. That's why
11 I believe it's different.

12 CHAIRMAN WALTHER: So if you have -- if
13 O'Donnell's reversed, it goes on appeal and it's reversed,
14 is there any other basis upon which you would claim that
15 there is not a violation. Okay, the court has ruled that
16 this can be criminalized. I don't think it has to be
17 criminalized to be necessarily civilized, but let's go ahead
18 and take that presumption. What then precludes us if it's
19 reversed?

20 MR. DEZSI: If the O'Donnell opinion is reversed?
21 I'm sorry, maybe make sure I understand your question.

1 CHAIRMAN WALTHER: I understand it may end up in
2 appeal, it gets reversed, are we going to be precluded, in
3 your opinion?

4 MR. DEZSI: I don't believe you're precluded
5 either way. I'm just making the argument that the O'Donnell
6 opinion, I believe, speaks for itself based on a plain
7 reading of the statute.

8 Of course, as I had mentioned before, it's the
9 only -- the only written opinion, so perhaps if, Mr.
10 Chairman, your question is whether the law will further
11 develop, whether there will be splits in the circuits, all
12 of that, I guess is left to be seen. However, I would ask
13 the Commission to look at the statute and look at the cases
14 and before you make any decision about proceeding, again, I
15 would just ask that you look at the cases that have been
16 cited.

17 I don't believe the General Counsel was on point
18 with the cases that they've cited and I don't believe that
19 the Commission's going to find that those are going to be
20 helpful in answering the question that O'Donnell squarely
21 addresses.

1 CHAIRMAN WALTHER: Let me ask you, are you
2 familiar with the Weinstein case, Weinstein case. It was
3 decided in 1978, where there was a finding of a violation of
4 a 441f, W-e-i-n.

5 MR. DEZSI: You know, I am not. At this
6 particular moment, I almost feel like I have alphabet soup
7 in my head. I always come into a hearing with all of these
8 cases and I usually remember all of them. It's perhaps very
9 well that I have read it and I probably have. But at this
10 particular moment, it's not -- it's not jogging my memory.

11 CHAIRMAN WALTHER: It's 462 F. Supp. 243, for
12 future.

13 MR. DEZSI: 562 F. Supp.

14 CHAIRMAN WALTHER: 243.

15 MR. DEZSI: 243, thank you.

16 COMMISSIONER McGAHN: You just jogged my memory,
17 Mr. Chairman, of what that case is about.

18 CHAIRMAN WALTHER: Okay. Would you like to --
19 what would you like to do about that?

20 COMMISSIONER McGAHN: Sorry.

21 CHAIRMAN WALTHER: Any further questions? If

1 there are no further questions -- Commissioner -- Mr. Vice
2 Chairman.

3 VICE CHAIRMAN PETERSEN: Thank you, just kind of a
4 follow-up on my last question. In the O'Donnell case, when
5 it was construing 441f, part of why it reached the
6 conclusion it did is because it said in 441f there's no
7 language like conduit or intermediary or directly or
8 indirectly like there is. It placed a lot of emphasis. In
9 fact, it quotes 441a and quotes language where it says, you
10 know, either directly or indirectly in 441b.

11 So even if we were to assume that 441f, that we're
12 to buy your argument, you know, lock, stock and barrel, do
13 you still have a problem under 441b, which says that a
14 contribution includes any direct or indirect payment?
15 Explain to me why a pre-arranged reimbursement scenario
16 wouldn't be considered a indirect contribution under 441b,
17 or 441a, for that matter?

18 MR. DEZSI: Well, I believe the answer to that
19 question stops again with 441f. If you don't have a 441f
20 violation, in other words, you have individuals who say, I
21 made a voluntary contribution and it's no one's right to

1 undermine my First Amendment right that I made a voluntary
2 contribution, and so you don't have a 441f, then I don't
3 believe you reach the 441b question.

4 In other words, it can't be two people's
5 contributions, do you understand if I put it that way? It
6 can't both be the individual's contribution who made it and
7 they said, I wanted to make this contribution, so that takes
8 441f off the table.

9 Well then I don't believe you could then turn
10 around and say well, but it can -- now it can be a 441b;
11 it's only one contribution. It has to belong to -- it has
12 to belong to the individual or it has to be some sort of
13 prohibited contribution. So if it belongs to the individual
14 and it's not a 441f, I don't think we reach 441b.

15 COMMISSIONER PETERSEN: I would agree that it's
16 got to be owned by somebody. But it seems to me that there
17 could be a difference between saying that on the one hand
18 it's not a contribution in the name of another and you laid
19 out the scenarios, the money order where you would submit
20 something on behalf of one of us. That would be kind of a
21 paradigmatic case of contributing in the name of another.

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1 Doesn't that still leave open the avenue though,
2 of saying that okay, even though that doesn't violate 441f,
3 you still have 441b? And that's where that third section of
4 the O'Donnell case comes in where -- it appears to me, and I
5 agree, that it's not fully fleshed out and it's not crystal
6 clear by any stretch. But it seems like it assumes as part
7 of its analysis that the reason why the O'Donnell
8 contribution, or O'Donnell may have caused the recipient to
9 file a false statement is because the contribution really
10 was O'Donnell's. And if that goes -- and if that -- the
11 amount that O'Donnell reimbursed, if that attaches back to
12 O'Donnell then that still seems like that keeps open some
13 problems under 441a and 441b.

14 But I agree that it's not fully fleshed out, but
15 that's why I wanted your opinion about where you think the
16 O'Donnell case goes in that section.

17 MR. DEZSI: The other problem is in the O'Donnell
18 case, there was no 441b charge, so I -- as you are pointing
19 out, it's not fleshed out. I have difficulty answering a
20 hypothetical as to whether it would or wouldn't be. Perhaps
21 my position is on one far end of the line, which is that

1 without having the statute drawn in terms that would
2 prohibit certain transactions, it's not prohibited.

3 However, the language about indirect and direct, I
4 don't really think that we have enough facts to determine
5 whether that would be -- that play or not, and especially
6 since O'Donnell didn't include a 441b violation, it wasn't
7 in play at all.

8 CHAIRMAN WALTHER: Thank you very much. Further
9 questions? So regulation, your position is it's just
10 invalid because of Chevron and that's not to be considered
11 by us.

12 MR. DEZSI: In part, I guess that's correct.

13 CHAIRMAN WALTHER: What is it about Chevron that
14 is invalid for our purposes?

15 MR. DEZSI: Chevron says -- in Chevron, it's the
16 U.S. Supreme Court's case, which talks about whether an
17 agency has jurisdiction or the extent of an agency's
18 jurisdiction to pass regulations. As the O'Donnell Court
19 pointed out when the prosecution asked the Court to rely on
20 110.4, or the advisory opinion, the 1996 advisory opinion,
21 the judge said, I'm not going to follow those because those,

1 110.4 and the advisory opinion, contradict the language of
2 the statue, so basically the agency has no more jurisdiction
3 to do what it cannot do as what it could do.

4 In other words, it didn't have the jurisdiction
5 from Congress to pass a regulation which is inconsistent
6 with the statute. If the statute says no turn on red, the
7 agency can't say well, we're going to pass regulations which
8 also say not only can you not turn on red, but you also
9 can't do this in this in X,Y,Z. You can't do it. And
10 that's what Chevron says.

11 And that's why I believe that the Court in
12 O'Donnell was completely correct in relying on Chevron. In
13 fact, I was elated to see that he actually cited Chevron
14 when I read it and saw that he -- what he had done with
15 those regulations, because I have always been somewhat
16 bothered by the 110.4 and the 1996 advisory opinion because
17 it's always struck me that those are not consistent with the
18 statute.

19 CHAIRMAN WALTHER: Are there any factual
20 circumstances in which 441f would be able to be considered
21 to impose a civil or criminal penalty?

1 MR. DEZSI: Oh, certainly. In the example -- the
2 example that Gerry Spence would always give is that you
3 can't make contributions in the names of the dead, the
4 fictitious or names randomly gathered from the phonebook.
5 Of course, I don't say it nearly as interesting or as cool
6 as he does and I don't have the hat to go along with it.
7 But in any event --

8 CHAIRMAN WALTHER: Do you have the jacket?

9 MR. DEZSI: I don't have the jacket, although I
10 was offered one in Wyoming.

11 CHAIRMAN WALTHER: I'm sure you were.

12 MR. DEZSI: But I declined it. I sort of -- I'm
13 embarrassed to say that I did not get --

14 CHAIRMAN WALTHER: I empathize with that.

15 MR. DEZSI: But if -- for instance if you were to
16 go and get the names of your 10 neighbors and go and make
17 contributions in their names and they have no idea, then you
18 have just violated 441f. So if your -- perhaps if your
19 question is does this statute fail either as void for
20 vagueness or for over breadth, no I don't think so, perhaps
21 not.

1 But we're not really looking at a void for
2 vagueness or an over breadth argument in this instance, but
3 rather just whether you apply it strictly on its face and
4 under the terms of the statute. So yes, there are instances
5 where it would apply?

6 CHAIRMAN WALTHER: You read the legislative
7 history of the statute to support the contention that
8 Spence's examples are exactly the way the Congress intended
9 them?

10 MR. DEZSI: I have to tell you that I have boxes
11 of legislative history as to the FECA laws and I have looked
12 at them exhaustively for years. However, it's part of that
13 alphabet soup right now. If you're asking me to remember a
14 particular one, nothing comes to mind.

15 But I have them all in my office and they have
16 blue binders on them and I had to order them all from Lexis
17 and they charged me a whole lot of money to ship them. But
18 I have looked at them and I don't recall finding anything
19 more on point. If there was, I probably would remember, but
20 perhaps some of you are sitting there saying, we know
21 something's in there and he's just not remembering.

1 But I don't remember. And like I said, this has
2 been my career for the last three or four years.

3 CHAIRMAN WALTHER: Further comments of any kind?
4 If not, would you like to sum up in about four minutes?

5 MR. DEZSI: Sure. I can even sum it up in less
6 than four minutes. I would just ask the Commission to take
7 a more sensible approach to this matter and conclude it
8 without any further action. I believe that my clients have
9 already been put through the test on this issue. They've
10 been through the trial. They were found not guilty.

11 I don't see how this will proceed with any
12 different of a result, so again, I would just ask the
13 Commission to look at those cases and take a more sensible
14 resolution to this after the Justice Department has already
15 done this case.

16 CHAIRMAN WALTHER: Okay, I did forget to ask the
17 Office of General Counsel if there were any questions that
18 you would like to pose; I apologize for that.

19 MS. DUNCAN: Thank you, Mr. Chairman. I don't
20 have any questions.

21 CHAIRMAN WALTHER: Okay. Counsel, thank you very

1 much. It was very edifying. Did a great job and appreciate
2 having you here.

3 MR. DEZSI: Thank you so much. Thank you for the
4 time and the opportunity. I appreciate it. Thank you.

5 CHAIRMAN WALTHER: Okay, just we're going maybe
6 reconvene in a minute.

7 MR. DEZSI: Okay.

8 CHAIRMAN WALTHER: I wanted to chat with --

9 (Pause.)

10 CHAIRMAN WALTHER: Why don't we take a recess for
11 five minutes?

12 (A brief recess was taken.)

13 CHAIRMAN WALTHER: We'll reconvene. The question
14 was whether or not to afford the -- the opportunity to brief
15 those two cases. It would not go beyond that, but in other
16 words, those are both cases that we called your attention to
17 which you were not able to give us a response at this point.

18 You have five business days. That would be until
19 let's see, next Wednesday, Thursday of next week, I guess,
20 5:00, would be e-mailed to our counsel.

21 MR. DEZSI: I'm sorry, was it Wednesday or

1 Thursday?

2 CHAIRMAN WALTHER: Five business days from today,
3 Thursday, Friday, Saturday, Sunday --or rather Sunday,
4 Monday -- Monday, Tuesday, Wednesday, so it would be 5:00 on
5 Wednesday.

6 COMMISSIONER BAUERLY: I believe five business
7 days would be next Tuesday?

8 CHAIRMAN WALTHER: Okay, next Tuesday. Yeah,
9 that's correct. I was thinking Wednesday. All right, 5:00
10 next Tuesday.

11 COMMISSIONER BAUERLY: Mr. Chairman, may I make
12 one --

13 CHAIRMAN WALTHER: Sure. Commissioner Bauerly.

14 COMMISSIONER BAUERLY: I appreciate the chairman
15 wanting to give an opportunity, but I guess from my
16 perspective I would hope this would be a voluntary option
17 provided to the respondents and not a demand from the
18 Commission.

19 So my -- I guess I would -- I'm asking the
20 chairman if this is an opportunity or a request, because I
21 would not object to providing an opportunity to respond to

1 matters that were raised for the first time.

2 CHAIRMAN WALTHER: This is simply --

3 COMMISSIONER BAUERLY: But I certainly don't --

4 CHAIRMAN WALTHER: -- simply an opportunity. It's
5 simply an opportunity. If you choose not to, of course,
6 it's your choice.

7 MR. DEZSI: If I may, because I'm a lawyer,
8 lawyers are always trained to always give you more paper.
9 They have to. It's just in our core. We have to give you -
10 - we can't sleep unless we give you more paper. So if
11 you've asked for it, we're thrilled to give you more.

12 CHAIRMAN WALTHER: Yes.

13 MR. DEZSI: I don't know, I'm just sort of joking.
14 I don't know if I will respond, but --

15 (Laughter.)

16 MR. DEZSI: Maybe there was --

17 CHAIRMAN WALTHER: What are you trying to tell us
18 then?

19 MR. DEZSI: It was my frustration with the legal -
20 - with the legal profession in general. No. But perhaps I
21 will, but I appreciate the opportunity. And just to be

1 clear, we were talking about the FEC v. Williams case?

2 CHAIRMAN WALTHER: That's correct.

3 MR. DEZSI: And that was the Southern District of
4 California, Central?

5 CHAIRMAN WALTHER: I can give you the case number.
6 I can give you the case number if you like.

7 COMMISSIONER McGAHN: Mr. Chairman, maybe you can
8 provide him a copy since this is an unreported opinion, so
9 he doesn't have to buy for a lot of money more blue binders
10 --

11 CHAIRMAN WALTHER: I'm just going to make a record
12 of it.

13 COMMISSIONER McGAHN: -- otherwise should be
14 publicly available.

15 CHAIRMAN WALTHER: I'm just going to make a record
16 of it.

17 COMMISSIONER McGAHN: Show him a copy so at least
18 he has it.

19 MR. DEZSI: And then the other one was the
20 Weinstein case, 462 F. Supp 243?

21 CHAIRMAN WALTHER: That's correct. The case

1 number is CV93-6321 in the Central District of California
2 and it was filed January 31, 1995. Office of General
3 Counsel?

4 MS. DUNCAN: Yes, Mr. Chairman. I would just add
5 that since we are offering the opportunity for Respondent's
6 counsel to address those opinions that you've mentioned, I'd
7 also draw his attention to six other unpublished opinions
8 that directly address violations of section 441f, and those
9 opinions are also inconsistent with the conclusion that was
10 reached in the recent O'Donnell decision.

11 Those opinions are easily accessible on our FEC
12 web site under the litigation page. If you'd like some
13 further information about those, we'd be happy to provide
14 them. But they are all including the Williams case, is also
15 summarized there.

16 MR. DEZSI: Okay, thank you.

17 CHAIRMAN WALTHER: All right, it is an offer which
18 we -- we've heard your response already. Until 5:00 next
19 Tuesday. Mr. Vice Chairman.

20 VICE CHAIRMAN PETERSEN: Thank you, Mr. Chairman.
21 I think that in light of the fact that it will be now a

1 total of eight cases rather than six cases, whether or not
2 we might want to provide a few extra days to respond, just
3 as a matter of equity.

4 CHAIRMAN WALTHER: Commissioner Bauerly.

5 COMMISSIONER BAUERLY: I would just, I guess, ask
6 us to remember that we have a statute of limitations issue
7 and I understand that there's been discussions of tolling
8 which have not resulted in any agreement to toll. And so I
9 just think that we should be mindful of that.

10 MS. DUNCAN: And again -- excuse me -- I'm sorry.

11 COMMISSIONER McGAHN: Sorry. That's why I
12 suggested five, but I really --

13 CHAIRMAN WALTHER: Commissioner McGahn.

14 COMMISSIONER McGAHN: I mean, I was the one that
15 made the request. It's really the Williams case I was
16 concerned about, not other cases not raised by
17 commissioners. But if we want to -- it seems to me if we
18 want to have all unreported opinions, five business days
19 does seem kind of reasonable.

20 I mean, you got a weekend in there and I know you
21 have 6th Circuit arguments and all this other stuff. We

1 appreciate you on short notice coming here today, but we do
2 have to keep this one moving because we don't want that to
3 be any more of an issue than it already is.

4 MR. DEZSI: Sure, it's not a problem. It's not a
5 problem.

6 COMMISSIONER McGAHN: There we go.

7 MS. DUNCAN: Excuse me, I just wanted to be clear
8 that I wasn't requesting that Respondent's counsel address
9 all of those cases. I simply want to make the Commission
10 and Respondent's counsel aware of them so that there's not a
11 later concern that there hasn't been notice provided.

12 CHAIRMAN WALTHER: It's not a request. In any
13 event, this is -- we'll call your attention to it. If you'd
14 like to mention -- you're free to do that. At least the
15 deadline on that is really 5:00 next Tuesday.

16 MR. DEZSI: And I should e-mail those to General
17 Counsel or staff, the Commission secretary?

18 CHAIRMAN WALTHER: Whichever the General Counsel
19 prefers?

20 MS. DUNCAN: Provide them to us and we'll be sure
21 that the commissioners receive them immediately.

1 MR. DEZSI: Okay.

2 CHAIRMAN WALTHER: Thank you very much, Counsel.

3 We're adjourned.

4 MR. DEZSI: Thank you.

5 (Whereupon, at 4:02 p.m., the hearing was
6 adjourned.)

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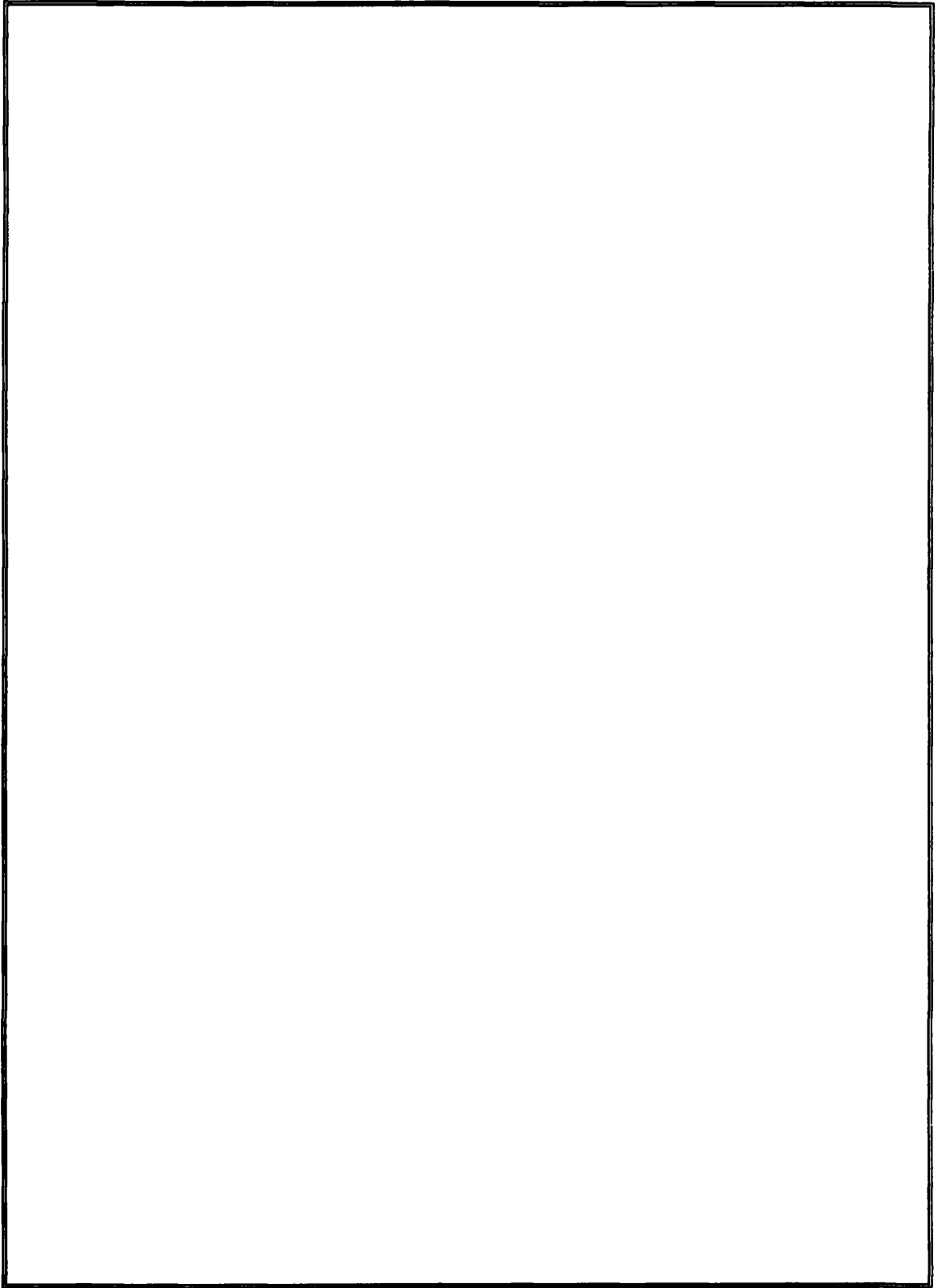
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